

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 09-2051-MD-ALTONAGA

In re

**DENTURE CREAM PRODUCTS
LIABILITY LITIGATION.**

_____ /

This Document Relates to All Actions

**CASE MANAGEMENT ORDER NO. 3
INITIAL SCHEDULING AND WRITTEN DISCOVERY ORDER (“CMO 3”)**

The Court, having considered the Motion for entry of CMO 3, it is

ORDERED AND ADJUDGED that:

I. PURPOSE AND APPLICATION OF CMO 3

The purpose of this Order is to provide procedures and scheduling for pleadings, motions, service or waiver of service, and written discovery generally applicable to the Denture Cream Products Liability Litigation. This Order applies to all cases docketed in MDL-2051 at the time this Order is entered and to related cases later filed in, removed to, or transferred to this Court. The “GSK Defendants” referenced in this Order include SmithKline Beecham Corporation d/b/a GlaxoSmithKline, GlaxoSmithKline Consumer Health Care L.L.C., GlaxoSmithKline Consumer Healthcare, L.P. and Block Drug Company, Inc. The “P&G Defendants” referenced in this Order include The Procter & Gamble Manufacturing Company and The Procter & Gamble Distributing LLC.

II. GENERAL PLEADING ISSUES

A. Separate Complaints. In an effort to avoid administrative complications and

CASE NO. 09-2051-MD-ALTONAGA

inefficiencies, claimants whose claims do not arise from the same individual denture cream user shall be required to file separate complaints.

B. Transfer to Home District at Conclusion of MDL. At the conclusion of the MDL proceedings, pursuant to 28 U.S.C. § 1404, remaining matters will be transferred by the MDL Court to the “Home District,” which is either (a) the federal court in which the case was originally filed; or (b) for cases filed directly pursuant to the provisions set forth in Section III below, the federal district court of the Plaintiff’s residence at the time of original filing of the Complaint, as identified by Plaintiff on the face of the Complaint pursuant to Section III below.

C. Answers and Responsive Pleadings/Preservation of Defenses. For cases docketed in the MDL at the time of this Order, properly served Defendants shall file their Answers, Fed. R. Civ. P. 12 pleadings, affirmative defenses or other responsive pleadings within sixty (60) days of this Order. For complaints docketed in the MDL subsequent to the entry of this Order, Defendants shall file their Answers, Fed. R. Civ. P. 12 pleadings, affirmative defenses or other responsive pleadings within sixty (60) days from (1) the date notice is received if notice is served pursuant to the waiver provisions of Section IV.A. below (applicable only to the GSK Defendants), or (2) the date of proper service on Defendant if the case is filed in the Southern District of Florida or transferred to and docketed in the MDL prior to proper service being accomplished, or (3) the date the new case is docketed in the MDL if Defendant(s) were previously served, whichever period is longer. Except as otherwise provided in Section III.A.1 below, nothing in this Paragraph or any other provision in this Order precludes the filing of Fed. R. Civ. P. 12 motions, including but not limited to, motions challenging venue or *forum non conveniens*, or any other motions, at other times; nor does this paragraph or any other provision of this Order preclude any party from seeking and

CASE NO. 09-2051-MD-ALTONAGA

obtaining a hearing on any such motions. Any such Motions may be filed, and hearings requested, in either the MDL Court before remand, or the Home District, or any other ultimate forum either prior to the transfer to the MDL Court or after remand from the MDL to the Home District or another district court. Defendants' rights to file motions or seek a hearing on Fed. R. Civ. P 12 challenges or other motions, including *forum non conveniens*, after transfer from the MDL to another district court are specifically preserved and are not waived as a result of the direct filing provisions set forth in Section III, any other provisions of this Order, or any Defendant's reliance thereon. By filing directly in the Southern District of Florida pursuant to Section III below, plaintiffs waive the right to object that a *forum non conveniens* challenge or request for hearing on such a challenge is untimely. The direct filing provisions of this Order do not affect any prescriptive or limitations defenses otherwise available to Defendants, *e.g.*, that the applicable prescriptive or limitations period expired prior to the direct filing of the Complaint in this District.

III. FILING OF CASES IN THIS DISTRICT WHEN VENUE IS OTHERWISE IMPROPER

To eliminate the delays associated with the transfer of cases filed in other federal district courts, the GSK Defendants, the P&G Defendants, and Plaintiffs have agreed to the terms and conditions below pertaining to the filing of denture adhesive cream products liability actions in this District, which are adopted and ordered by this Court.

A. Direct Filing of New Complaints in the Southern District of Florida

1) A plaintiff may file a denture adhesive cream products liability action against any or all of the Defendants in the Southern District of Florida even if venue is not proper under 28 U.S.C. §1391. In that event, Defendants shall forebear from filing a motion to dismiss or transfer

CASE NO. 09-2051-MD-ALTONAGA

the action in this MDL proceeding on grounds that venue is improper under 28 U.S.C. §1391. Pursuant to Rule 7.5 of the Rules of Procedure of the JPML, no action by the JPML is required, and the subsequent transfer to and docketing of such directly-filed actions in MDL-2051 and this Court shall be facilitated by designating such actions at the time of filing in the Southern District of Florida as “related actions” and referencing in the case header MDL-2051, In re Denture Cream Products Liability Litigation.

2) Complaints filed directly in the Southern District of Florida shall state on the face of the Complaint the specific residence (city and state) and citizenship of each Plaintiff at the time the Complaint is filed and shall state on the face of the Complaint the federal district court that encompasses Plaintiff’s residence at the time of filing the Complaint. Plaintiff herein affirm and agree that, at the conclusion of the MDL proceedings, cases filed directly in the Southern District of Florida shall be transferred to the federal district court of Plaintiff’s residence as stated on the face of the Complaint.

B. General Provisions Regarding Cases Filed in This District Pursuant to This Section

This Section III applies to cases filed after this Order is entered and applies only to Complaints filed in this District. Nothing in this Order requires a Plaintiff seeking to pursue a denture adhesive cream products liability action to file a Complaint directly in this District. If venue in a case is proper in this District, this Order does not affect Defendants’ rights to seek a transfer of the case to another district on grounds of *forum non conveniens* or other applicable grounds.

IV. SERVICE OF PROCESS

A. Waiver of Service of Process – GSK Defendants

To eliminate disputes over service of process and to reduce the expense of such service, the

CASE NO. 09-2051-MD-ALTONAGA

GSK Defendants have agreed to waive the normal legal requirements for service of process in the Denture Cream Products Liability MDL. Specifically, the GSK Defendants have agreed to waive service of summons for the Denture Adhesive Cream Cases filed in any federal court or removed to federal court pursuant to the procedures and provisions of Rule 4(d) of the Federal Rules of Civil Procedure. Instead, the notice, a copy of the Complaint, and the waiver request as contemplated by Rule 4(d) shall be delivered by registered mail, return receipt requested upon the following:

For GSK Defendants:

Ellen Hudock
PO Box 7929
MC FP 2225
Philadelphia, PA 19102-1204

Upon receipt of the signed waiver request, Plaintiff's counsel shall file the same with the Court where the Complaint was originally filed. A copy of each notice transmitted to any of the GSK Defendants in the foregoing manner also shall be provided via email to Lead and Liaison Counsel for the GSK Defendants. Notice and waiver of service will be effective only if addressed and served as described above. The foregoing procedure shall apply to Denture Adhesive Cream cases filed in or removed to federal court only and not to any other litigation. Defendants reserve all other rights available to them under federal or state law and under applicable treaties and conventions.

The GSK Defendants' responsive pleadings shall be due as set forth in Section II.C. of this Order.

B. *Pleadings, Motions, and Other Documents with the Designation "THIS DOCUMENT RELATES TO ALL ACTIONS"*

Plaintiffs' Lead and Liaison Counsel and Defendants' Lead and Liaison Counsel shall be

CASE NO. 09-2051-MD-ALTONAGA

provided with one copy of each document with the designation “THIS DOCUMENT RELATES TO ALL ACTIONS” served and/or filed by a Party, including any and all attachments, to be delivered by electronic mail. Pursuant to Fed. R. Civ. P. 5, service on Plaintiffs’ Lead and Liaison Counsel constitutes service on other Plaintiffs’ attorneys and Plaintiffs in this action and service on Defendants’ Lead and Liaison Counsel constitutes service on other Defendants’ attorneys and Defendants in this action. Nothing in this paragraph is intended to supersede this District’s case management/electronic case file (ECF) system.

C. *Pleadings, Motions and Other Documents Related Only to Specific Actions*

Pleadings, motions and other documents related only to specific actions served and/or filed by a party, including any and all attachments, are to be delivered by electronic mail and shall be served on the involved Defendants’ Lead Counsel and Liaison Counsel, and counsel of record for that action. Nothing in this paragraph is intended to supersede this District’s case management/electronic case file (ECF) system.

V. **MOTIONS AND HEARINGS**

A. *Dispositive Motions*

Except for emergencies or unless otherwise agreed by the Parties, dispositive motions shall not be brought for hearing at any time other than a regularly scheduled status conference. In order to be heard at a regularly scheduled status conference, a dispositive motion must be filed and served at least thirty (30) days before said conference. Except for emergencies or unless otherwise agreed by the parties, any dispositive motion filed and served less than thirty (30) days before a status conference shall be heard not at the upcoming status conference but at the status conference thereafter.

CASE NO. 09-2051-MD-ALTONAGA

B. Non-Dispositive Motions

Except for emergencies or unless otherwise agreed by the Parties or permitted or ordered by the Court upon motion by any Party, non-dispositive motions shall not be brought for hearing at any time other than a regularly scheduled status conference. In order to be heard at a regularly scheduled status conference, a non-dispositive motion must be filed and served at least twenty (20) days before said conference, unless otherwise permitted or ordered by the Court upon motion by any Party. Except for emergencies or unless otherwise agreed by the parties, or permitted or ordered by the Court upon Motion by any Party, any non-dispositive motion filed and served less than twenty (20) days before a status conference shall be heard not at the upcoming status conference but at the status conference thereafter.

VI. WRITTEN DISCOVERY

A. Required Disclosures by Plaintiffs

1) *Initial Disclosures.* Within forty-five (45) days of the date of this Order or within thirty (30) days of the date on which an action is directly filed in the Southern District of Florida or docketed in MDL-2051, whichever is later, each Plaintiff shall serve on each group of named Defendants (the GSK Defendants and the P&G Defendants) the Initial Disclosures required by Fed. R. Civ. P. 26(a)(1)(A) without awaiting a discovery request.

2) Within forty-five (45) days of the date of this Order or within thirty (30) days of the date on which an action is directly filed in the Southern District of Florida or docketed in MDL-2051, whichever is later, a plaintiff who is subject to this Order shall serve Defendants in the action brought by such person with:

(a) Fact Sheets. A completed Fact Sheet (the form of which is being

CASE NO. 09-2051-MD-ALTONAGA

negotiated by the Parties, with any disputes to be submitted to the Court). The Fact Sheet shall include a completed Affidavit attesting that the information contained therein is true and correct.

(b) Authorizations for Release of Records. Plaintiffs or their spouses who claim physical or emotional injuries shall provide addressed and signed authorizations for each health care provider identified in Plaintiff's Fact Sheet (the form of which shall be negotiated by the Parties and submitted to the Court). Plaintiffs claiming lost income or wages shall provide signed authorizations for release of W2 records (if employed by an employer) and/or for release of tax records (if self-employed). Plaintiff shall also provide signed authorizations for release of employment records, disability and workers compensation records, social security records, insurance records, and educational records.

(i) The above authorizations shall be undated.

(ii) Plaintiffs' service of authorizations constitutes permission for Defendants to date (and where applicable, re-date) authorizations before sending to healthcare providers.

(iii) The authorizations are limited to release of documents only. Defendants agree not to conduct or attempt to conduct any *ex parte* interviews of any health care providers of a Plaintiff.

(c) Copies of all documents subject to the requests for production contained in the Plaintiffs' Fact Sheet which are in the possession of Plaintiffs or their counsel.

(d) In addition to the addressed authorizations described above, Plaintiff's counsel shall also maintain in their file unaddressed, executed authorizations. Plaintiff's counsel shall provide executed authorizations to Defendants' counsel within fourteen (14) days of a request

CASE NO. 09-2051-MD-ALTONAGA

for authorizations. Defendants' use of authorizations provided by Plaintiffs pursuant to Section VI.A.1(b) above and this Section VI.A.1(d) shall be subject to the provisions of Section C below.

3) *Fact Sheets as Interrogatories and Requests for Productions.* The Plaintiffs' Fact Sheets which Plaintiffs are required to answer shall be considered interrogatory answers pursuant to Fed. R. Civ. P. 33 and as responses to requests for production pursuant to Fed. R. Civ. P. 34 and will be governed by the standards applicable to written discovery under Fed. R. Civ. P. 26 through 37. The presumptive limit of twenty-five (25) on the number of Interrogatories allowed under Rule 33(a)(1) does not apply to Plaintiffs' Fact Sheets. The questions and requests for production contained in the Fact Sheet are non-objectionable and shall be answered without objection. This section does not prohibit a plaintiff from withholding or redacting information based upon a recognized privilege. If a plaintiff withholds or redacts any information on the basis of privilege, he or she shall provide Defendants with a privilege log pursuant to Section VI.G.1 below. In the event that a dispute arises concerning the completeness or adequacy of a plaintiff's response to any request or question contained in the Fact Sheet, this Section shall not prohibit the plaintiff from asserting that his or her response is adequate.

B. *Required Disclosures by Defendants*

For currently filed cases, within forty-five (45) days of the date of this Order, the Defendants shall serve on the Plaintiffs the Initial Disclosures required by Fed. R. Civ. P. 26 (a) (1) (A) without awaiting a discovery request. For subsequently filed cases, Defendants shall serve on Plaintiffs their Initial Disclosures contemporaneously with the filing of Defendant's Answer. To the extent that such responses are applicable to all Plaintiffs, Defendants response shall so indicate.

CASE NO. 09-2051-MD-ALTONAGA

C. Defendants' Discovery of Documents from Third Parties

1) *Defendants' Procedure to Obtain Records from Third Parties.* Defendants may request Plaintiffs' medical/dental records, employment records, disability and workers compensation records, social security records, insurance records, educational records and/or tax records from third parties directly or through a record copy service. Unless Plaintiff has waived this review period, information specifying each such request will be provided to Plaintiff's counsel who will have fifteen (15) days from the date of receipt of such information in which to notify Defendants' counsel and the third party or record copy service of any objection to production of the records to Defendants. If no such objection is made, production from the third party or record copy service to Defendants shall occur forthwith. If an objection is made, counsel shall confer concerning that objection, and if the objection cannot be resolved, Plaintiffs shall file a motion for a protective order to preclude the discovery of all or part of the records requested with this Court and the parties agree to have the MDL Court decide the issue. That motion shall be filed with this Court no later than ten (10) days after the parties have conferred or reasonable attempts at conferring have failed. If said motion is filed, the third party or record copy service will not produce to Defendants a copy of the records subject to the request to which an objection has been made until such time as the motion is resolved. If no such motion is filed within the time provided herein, the third party or record copy service shall produce the records to Defendants. Plaintiffs may obtain their own copy of the same from the third party or from the record copy service upon payment to the record copy service of the reasonable costs of copying such documents.

2) *Defendants' Use of Authorizations.* Defendants may not use authorizations except in accordance with this Order or by agreement of the parties. The Parties may subpoena

CASE NO. 09-2051-MD-ALTONAGA

records from any third party pursuant to the Federal Rules of Civil Procedure. Any Party may waive the notice of subpoena provisions of the Federal Rules, either in the Fact Sheet or otherwise in writing. If there is such a waiver, the subpoena may be served without the time period allowed for objections.

D. *Plaintiffs' Master Set of Interrogatories*

Plaintiffs Steering Committee shall develop and serve a Master Set of Interrogatories to each Defendant no later than sixty (60) days after the date of this Order. Defendants have sixty (60) days to respond. Defendants may make objections pursuant to Fed. R. Civ. P. 33. The parties shall meet and confer as soon as practicable to resolve disputes containing objections thereto. Motions to compel should only be filed on those issues that cannot in good faith be resolved. Plaintiffs may propound not more than fifteen (15) additional or Supplemental Interrogatories including discrete subparts, not duplicative of any prior Master Interrogatory, on or before March 31, 2010. Additionally, Plaintiffs may serve a limited number of case-specific Interrogatories as set forth in Section VI.K. below.

E. *Plaintiffs' Master Requests for Production*

Plaintiffs Steering Committee shall develop and serve a Master Set of Requests for Production to each Defendant no later than sixty (60) days after the date of this Order. Defendants have sixty (60) days to respond. Defendants may make objections pursuant to Fed. R. Civ. P. 34. The parties shall meet and confer as soon as practicable to resolve disputes containing objections thereto. Motions to compel should only be filed on those issues that cannot in good faith be resolved. Plaintiffs may propound additional or Supplemental Requests for Production including discrete subparts, not duplicative of any prior Master Request for Production, on or before March

CASE NO. 09-2051-MD-ALTONAGA

31, 2010. Additionally, Plaintiffs may serve a limited number of case-specific Requests for Production as set forth in Section VI.K. below.

F. Document Production by Defendants

The Defendants have produced or will produce relevant, non-privileged, discoverable documents and information related to their respective zinc-containing denture cream adhesive products. Document production by the GSK Defendants has been ongoing in several federal cases. On a rolling basis, both the GSK Defendants and the P&G Defendants will have made a substantial production of documents on or before October 16, 2009. The Defendants will supplement their productions as additional relevant, non-privileged information is identified.

G. Privilege Logs

The parties will produce privilege logs in PDF format or similar electronic format. A Party will produce a privilege log within ninety (90) days after its first production of documents for which privilege is asserted to apply, and within the same time period following any subsequent or rolling productions.

1) Consistent with Fed. R. Civ. P. 26(b)(5), the Parties' privilege logs shall include the following information:

- (a) Custodian or source;
- (b) Date;
- (c) From/author(s) – to the extent available¹;
- (d) Recipient(s) (for email and hard-copy communications such as letter

¹ Author/recipient information not included for individual attachments to emails.

CASE NO. 09-2051-MD-ALTONAGA

and internal memoranda) (including copies and blind copies²)

(e) Identification of the privilege claimed;

(f) Description of the document and basis for the privilege claim.

2) Inadvertent Production of Privileged Documents is addressed in Case Management Order No. 2 – Confidentiality and Protective Order.

H. Costs of Production

While each Party expressly reserves its right to seek costs relating to this litigation, including the costs of producing documents and reasonably accessible electronic documents, initially each Party will bear the costs to process, review and produce its own documents and reasonably accessible ESI.

I. Protective Order for Confidential Information

The Parties are submitting contemporaneously a joint proposed Protective Order to regulate the use, disclosure or dissemination of confidential documents or information of the Parties or third parties that may be produced during this litigation. The Court will enter the Protective Order to supplement the terms of this Case Management Order.

J. Case Specific Written Discovery by Defendants as to the Individual Plaintiffs

1) *Interrogatories*. The GSK Defendants and the P&G Defendants may each propound no more than ten (10) interrogatories including discrete subparts pursuant to Fed. R. Civ. P. 33 directly to counsel of record for each plaintiff in each respective case. These Interrogatories may not duplicate any request contained in the Plaintiff's Fact Sheet. Plaintiffs may make objections pursuant to Fed. R. Civ. P. 33. The parties shall meet and confer as soon as practicable to resolve disputes containing objections thereto. Motions to compel should only be filed on those

CASE NO. 09-2051-MD-ALTONAGA

issues that cannot in good faith be resolved. Absent agreement by the plaintiff, any defendant may apply to the Court to serve additional interrogatories only upon a showing of good cause and the specific identification of the additional interrogatories sought to be served. Answers to interrogatories shall be served by each plaintiff directly to counsel of record for each defendant, no later than thirty (30) days after receipt of the same.

2) *Requests for Production.* The GSK Defendants and the P&G Defendants may each propound no more than ten (10) requests for production including discrete subparts directly to counsel of record for each plaintiff in each respective case. Defendants may not duplicate any request contained in the Plaintiff's Fact Sheet. Plaintiffs may make objections pursuant to Fed. R. Civ. P. 33. The parties shall meet and confer as soon as practicable to resolve disputes containing objections thereto. Motions to compel should only be filed on those issues that cannot in good faith be resolved. Absent agreement by the plaintiff, any defendant may apply to the Court to serve additional document requests only upon a showing of good cause and the specific identification of the additional request(s) sought to be served. Answers to requests for production shall be served by each plaintiff directly to counsel of record for each defendant, no later than thirty (30) days after receipt of the same.

K. *Case Specific Written Discovery by Individual Plaintiffs to Defendants*

1) *Interrogatories.* Individual Plaintiffs may propound no more than ten (10) interrogatories including discrete subparts pursuant to Fed. R. Civ. P. 33 to the GSK Defendants or the P&G Defendants (or both in the event both sets of Defendants are named in a particular case) in each respective case. These Interrogatories may not duplicate any request contained in Plaintiff's Master Interrogatories to Defendants. Defendant(s) may make objections pursuant to Fed. R. Civ.

CASE NO. 09-2051-MD-ALTONAGA

P. 33. The parties shall meet and confer as soon as practicable to resolve disputes containing objections thereto. Motions to compel should only be filed on those issues that cannot in good faith be resolved. Absent agreement by the Defendant(s), any Plaintiff may apply to the Court to serve additional interrogatories only upon a showing of good cause and the specific identification of the additional interrogatories sought to be served. Answers to Interrogatories shall be served by Defendant(s) directly to counsel of record for the specific Plaintiff, no later than thirty (30) days after receipt of the same.

2) *Requests for Production.* Individual Plaintiffs may propound no more than ten (10) requests for production including discrete subparts to the GSK Defendants or the P&G Defendants (or both in the event both sets of Defendants are named in a particular case) in each respective case. Plaintiffs may not duplicate any request contained in the Plaintiffs' Master Requests for Production to Defendants. Defendant(s) may make objections pursuant to Fed. R. Civ.

P. 33. The parties shall meet and confer as soon as practicable to resolve disputes containing objections thereto. Motions to compel should only be filed on those issues that cannot in good faith be resolved. Absent agreement by the Defendant(s), any Plaintiff may apply to the Court to serve additional document requests only upon a showing of good cause and the specific identification of the additional request(s) sought to be served. Answers to requests for production shall be served by Defendant(s) directly to counsel of record for the specific Plaintiff, no later than thirty (30) days after receipt of the same.

L. *Case Specific Discovery Conducted by Defendants as to the Class Complaints*

Should Plaintiffs proceed with their class complaints, class discovery will be addressed in a separate Case Management Order.

CASE NO. 09-2051-MD-ALTONAGA

VII. DEPOSITIONS OF PLAINTIFFS AND OTHER CASE-SPECIFIC WITNESSES

By October 1, 2009, the parties will submit a proposed protocol for the taking of depositions of Plaintiffs and other case-specific witnesses.

VIII. DEPOSITIONS OF DEFENDANTS' PERSONNEL

By October 1, 2009, the parties will submit a proposed protocol for the taking of depositions of Defendants' personnel.

IX. COMPLETION OF FACT DISCOVERY

All fact discovery shall be completed by December 1, 2010, except for case-specific fact witnesses and Plaintiffs in cases filed after January 1, 2010. Completion of case-specific fact discovery in any such later-filed case shall be completed within twelve (12) months of the date of initial service of the complaint upon a defendant.

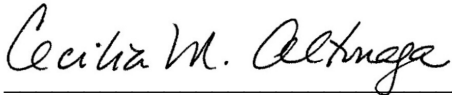
X. EXPERT WITNESS, *DAUBERT* CHALLENGES AND DISPOSITIVE MOTIONS

The schedule and requirements for expert witness discovery, *Daubert* challenges, and dispositive motions shall be addressed in subsequent Orders of this Court.

XI. NEXT STATUS CONFERENCE

The next Status Conference shall be held on October 22, 2009, at 11:00 a.m. The parties will submit a proposed Agenda three (3) days prior to the Status Conference.

DONE AND ORDERED in Chambers at Miami, Florida, this 3rd day of September, 2009.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record